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The Reserved Rights Doctrine: Case Study Involving Black Canyon of the Gunnison National Park

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The United States Supreme Court has developed a legal doctrine — the “reserved rights doctrine” — that allows the United States to “reserve” water for use on federal lands, regardless of the laws of the state where the lands are located. Notwithstanding, the United States Department of the Interior and the State of Colorado recently reached an agreement under which the United States will rely on a combination of federal and state water rights — a “reserved” right under federal law and a state-based right under Colorado law — to serve the needs of a national park in Colorado. The United States’ approach of relying on combined federal and state rights departs from its traditional approach, which has been to rely wholly on federal reserved rights in using water on federal lands. This innovative, historic approach creates an important precedent for meeting the needs of federal reserved lands, one that invites the states to participate in the process; this, in turn, may signal closer cooperation between the federal government and the states in managing the nation’s water resources. This paper describes the origins and nature of the reserved rights doctrine, and how the doctrine played a pivotal role in the recent agreement involving the national park in Colorado.

The Reserved Rights Doctrine

The states were regarded earlier in our national history as having exclusive authority to regulate water, subject only to the federal power to regulate navigation. After the American Revolution, the King of England’s sovereignty over water passed to the original thirteen states. The states delegated authority in the Constitution to the

federal government to regulate interstate commerce — and hence to regulate navigable waters, which were, at least at that time, a vital link to interstate commerce. Otherwise, however, the states retained their sovereignty over water. When new states were admitted to statehood, they were admitted on an “equal footing” with other states, and thus also acquired sovereign interests in their waters (*Martin v. Waddell* 1842, *Shively v. Bowlby* 1894).

The Supreme Court and Congress have often recognized the states’ primacy over water. When Congress passed land and mining laws in the late-nineteenth century authorizing settlement and mining of federal lands in the West, it provided that the settlers’ and miners’ water rights were governed by state laws, not national laws. In 1935, the Supreme Court held that these land and mining laws “severed” the water on the public lands, and thus that the states control the use of water even though the federal government owns the lands (*California Oregon Power Co. v. Beaver Portland Cement Co.* 1935). More recently, the Supreme Court held that Congress, in passing a 1902 statute authorizing the federal government to build projects to reclaim the arid western lands, required that the federal projects must comply with state water rights laws (*California v. United States* 1978). As the Court stated, Congress’ reclamation policies are interwoven with a “consistent thread of purposeful and continued deference to state water law ” (438 U.S. at 653).

In 1908, the Supreme Court substantially limited the states’ traditional authority to regulate water (*Winters v. United States* 1908). In *Winters*, Indian tribes occupying the Fort Belknap Indian Reservation in Montana began diverting water to the

reservation to irrigate the lands. Many homesteaders had been diverting water from the same river for many years to irrigate their own lands, thus leaving no water for the tribes. The United States sued the homesteaders on behalf of the tribes, arguing that the tribes had a superior claim to the water. The Supreme Court agreed. The Court held that Congress has the right to reserve water for use on Indian reservations that have been reserved from the public domain; this right, the Court said, is based on the Property Clause of the Constitution, which allows Congress to regulate federal lands. The Court also held that Congress, in creating the Fort Belknap Reservation, impliedly reserved water for the tribes' irrigation needs, even though Congress had not clearly addressed the subject when it created the reservation. This decision established what became known as the "*Winters Doctrine*." Under this doctrine, the United States impliedly reserves water for use on Indian reservations when it creates the reservations. As originally conceived, the *Winters Doctrine* applied only to Indian reservations.

The Supreme Court subsequently expanded the *Winters Doctrine* by applying it to all federal land reservations, not just Indian reservations (*Arizona v. California* 1963, *Cappaert v. United States* 1976). The doctrine now applies for example, to national parks, national forests, national monuments, national wildlife refuge areas, and other federal lands. The doctrine in its expanded form is generally known as the "federal reserved rights doctrine." Under this doctrine, when Congress reserves lands from the public domain, it impliedly reserves sufficient water to serve the purposes for which the lands were reserved. The amount of the reserved water is that "necessary to fulfill the purpose of the reservation, no more," (*Cappaert*, 426 U.S. at 138), and "without [which] the purposes of the reservation would be entirely defeated," (*United States v. New Mexico* 1978). In *Cappaert*, the Supreme Court held that the reserved rights doctrine precludes ground water pumping that reduced water levels and thus endangered the pupfish in Devil's Hole, a national monument in Nevada.

The priority of a federal reserved water right, as against the rights of other users under state law, is based on the date that the lands were withdrawn from the public domain. Thus, the reserved right is senior to private water rights acquired under state law after the lands were reserved, and junior to water

rights acquired before the lands were reserved. As a practical matter, many if not most federal land reservations supporting reserved rights occurred relatively early in the West's history, and thus federal reserved rights generally are senior to most rights acquired under state law. As the Supreme Court has stated, "claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams," and "when ... a river is fully appropriated, federal reserved rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators" (*New Mexico*, 438 U.S. at 705).

Recognizing these impacts on state regulation and private rights, the Supreme Court in 1978 substantially limited the reserved rights doctrine, at least as applied to non-Indian lands. In *United States v. New Mexico*, supra, 438 U.S. 696, the Court held that reserved water rights apply only to "primary" reservation purposes, not "secondary" reservation purposes. In that case, the United States Forest Service claimed reserved water rights for instream flows in the Rio Mimbres in New Mexico, asserting that such instream flows were necessary to serve the purposes of the Gila National Forest; the specified purposes were recreation, aesthetics, wildlife and cattle grazing, among others. The United States claimed the reserved rights under authority of the Forest Service's Organic Administration Act of 1897 and the Multiple-Use Sustained-Yield Act (MUSYA) of 1960. The Supreme Court rejected the United States' position. The Court ruled that Congress impliedly reserved water rights in the Organic Act and MUSYA only for two "primary" reservation purposes — securing favorable conditions of water flows and furnishing a continuous supply of timber — and that Congress did not impliedly reserve water for "secondary" reservation uses, such as providing instream flows for wildlife and other purposes. The Court stated:

Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended,

consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator. (438 U.S. at 702).

The Black Canyon of the Gunnison National Park

In 1933, President Herbert Hoover issued a proclamation creating a national monument — the Black Canyon of the Gunnison National Monument — in a stretch of the Gunnison River in Colorado. The Black Canyon consists of steep, rocky gorges that are among the most spectacular gorges found anywhere in the United States. The monument's purposes, according to the proclamation, are “for the preservation of the spectacular gorges and additional features of scenic, scientific, and educational purpose.” In 1999, Congress designated the monument as a national park, which is known as the Black Canyon of the Gunnison National Park (Park).

Many years after President Hoover created the original monument, Congress created a reclamation project — the Aspinall Unit — on a stretch of the Gunnison River above the Park. Authorized by Congress in 1956, the Aspinall Unit provides water supplies for irrigation, domestic use, industrial needs, recreation, and other uses. The Gunnison River is a tributary of the Colorado River, which is a major water source for several western states, including Colorado. The Aspinall Unit is part of a larger congressional plan — embodied in the Colorado River Storage Project Act — to develop Colorado's share of Colorado River water for the state's future growth needs.

In creating the Aspinall Unit, Congress ordered that construction cannot commence until the U.S. Bureau of Reclamation, which is responsible for operating the project, has examined the “economic justification” for the project and has concluded that “the benefits of such unit will exceed the costs.” The Bureau of Reclamation, after reviewing the matter, submitted its economic justification report to Congress. The report concluded that the project was economically justified based on the Bureau of Reclamation's proposed operational plan, which, among other things, assumed a minimum annual flow of water through the Park at the rate of 100 cubic-feet-per second (cfs). On the basis of this report, the project was built and commenced operations.

As the demands for Gunnison River water increased, some water users brought an action in the Colorado Water Court for a general stream adjudication, seeking a declaration of the respective rights and priorities of all water users in the river. The United States was named as a party in the adjudication pursuant to a federal statute, the McCarran Amendment, that waives the United States' sovereign immunity in general stream adjudications.

In 1971, the United States filed a claim in the adjudication for a reserved water right for the Park. The Colorado Water Court assigned the United States' claim to a Special Master, who, after hearing the matter, recommended that the United States' reserved rights claim be recognized. The Colorado Water Court agreed with the recommendation.

On appeal to the Colorado Supreme Court, the state's high Court in 1982 upheld the United States' reserved rights claim. The Court stated that the “purpose” of the monument is to “conserve and maintain in an unimpaired condition the scenic, aesthetic, natural, and historic objects of the monument, as well as the wildlife therein.” According to the Court, these uses include “direct flow and storage rights, transportation rights, and well rights” for myriad purposes — such as “recreational uses,” “domestic uses,” “agricultural and irrigation,” among many others.

Although the Colorado Supreme Court upheld the United States' reserved right claim, the Court did not quantify the United States' right by determining the amount of water necessary to satisfy it. Instead, the Court remanded this issue back to the Colorado Water Court.

Nineteen years later, on January 17, 2001, the United States applied to the Colorado Water Court for quantification of the Park's reserved right. The application requested recognition of reserved rights for both (1) an annual “base flow” of water and (2) annual “peak and shoulder flows.” The “base flows” are the relatively low-volume flows that occur more or less continuously throughout the year, and the “peak and shoulder flows” are the episodic, high-volume flows that occur during spring runoff periods, and which vary from year to year depending on the amount of rainfall. According to the application, the Park's reserved right would have a priority date of November 13, 1957, which is the date that the Aspinall Unit project acquired its water rights

to the application, the Park's reserved right would have a priority date of November 13, 1957, which is the date that the Aspinall Unit project acquired under state law. This means that the Park's reserved water right would have equal priority with the Aspinall Unit's water rights, and thus, according to the application, the United States would have "flexibility" in managing the Aspinall Unit in order to meet the Park's reserved rights.

The Bureau of Reclamation, which is responsible for operating the Aspinall Unit, expressed some concerns about the amount of the United States' reserved right claim. The Bureau stated that the United States' claim would potentially allow the Park to claim the entire amount of spring runoff flows, which may be 12,000 cfs or even higher, and that this would require the Bureau to allow large quantities of Gunnison River water to pass through the reclamation project, thus impairing the Bureau's ability to store the water in order to meet its commitments to its contractors.

The Agreement Between the Department of the Interior and the State of Colorado

The Department of the Interior, which administers the Park, eventually determined that the amount of water claimed by the United States as a reserved right for the Park was more than could be properly justified under the Supreme Court's decision in *United States v. New Mexico*, in that the amounts claimed were more than necessary to meet the Park's "primary" needs. The department also believed that the Park's needs could be met by a combination of a federal reserved water right — reduced in accordance with the *New Mexico* decision — and a state-based water right under Colorado law. Accordingly, the Department of the Interior and the State of Colorado commenced negotiations for an agreement that would allow the United States to use water for the Park under a combined federal reserved right and a state-based right. The parties reached an agreement on April 2, 2003, which was finalized by a Memorandum of Agreement signed on July 31, 2003. The agreement has two main parts.

First, the agreement provided that the Park shall have a federal reserved water right to an annual "base flow" of water, in the amount of 300 cfs or

natural flow, whichever is less. This ensures that the Park will receive a continuous, although limited, flow of water during the entire year. This reserved "base flow" right shall have a 1933 priority date, which is the date that the monument was originally created by presidential executive order. This means that the Park's "base flow" right shall have priority over the Aspinall Unit's water rights, which were acquired under Colorado law in 1957. Thus, in times of extreme shortage, the Park's reserved right must be served before the Aspinall Unit's needs are met. Also, since the reserved right is 300 cfs or "natural flow," whichever is less, the Aspinall Unit is not required to release water to satisfy the Park's reserved right during times of extreme shortage, when the river flow is less than 300 cfs; the Park is only entitled to "natural flow" under these circumstances, which is what the Park would have received if the Aspinall Unit had not been built.

Second, the agreement provided that the Park shall have a water right for "peak and shoulder" flows under Colorado law, with a priority date of 2003. As noted, these "peak and shoulder" flows are episodic, high-volume flows resulting from spring runoff, which may vary greatly from year to year. Thus, the Park's right to these high-volume flows will depend on Colorado law, not the reserved rights doctrine. Since this state-based right has a 2003 priority date, the right would be subordinate to the rights of the Aspinall Unit, which were acquired in 1957, but would be senior to all rights acquired after 2003 and would include all potential future water development both within and outside the Gunnison River basin. Under the agreement, the United States will submit an application for its state-based right to the Colorado Water Conservation Board (CWCB), which is authorized under Colorado law to grant water right permits for "instream flows" of water. Subsequently the United States submitted its application to the CWCB, which granted the "instream flow" rights.

In effect, the agreement provided that the Park would have a combined federal and state water right — a federal reserved right for base flows of up to 300 cfs, and a state-based right for varying "instream" spring peak flows. The Department of the Interior determined that this combination of federal and state rights would be sufficient to serve the Park's reasonably foreseeable future needs, based on the river's actual hydrology during the last twenty-six years.

As a result of the agreement, the United States amended its application for a quantification of its water rights in the Colorado Water Court. The United States withdrew its claim for a reserved right in the amounts claimed in the original application, in the amounts claimed in the original application, and instead claimed a federal reserved right for base flows of up to 300 cfs. The United States has also filed a water right claim under Colorado law for “instream flows.” The United States’ application is still pending.

Some environmental organizations brought a lawsuit against the United States, claiming that the United States has violated federal law by reducing the amount of its reserved rights claim, in that it has improperly disposed of federal property and delegated its responsibility to manage federal property without congressional approval. This action is also still pending. In the author’s judgment, these challenges are unmeritorious, because the Secretary of the Interior has broad, discretionary authority to determine the nature of federal property claims and has not exceeded such authority in this case.

Conclusion

The agreement between the United States and Colorado regarding the Black Canyon of the Gunnison National Park has historic implications. This may be the first time, at least in the modern era, that the United States has agreed to acquire its water rights for a federal land reservation under a combination of federal and state laws, rather than relying wholly on federal law for its rights. The United States’ innovative approach establishes a precedent that protects federal interests in reserved lands, while affording respect for the states’ traditional water rights authority and for private rights. The Black Canyon agreement, if followed in other cases, may lead to greater cooperation between the federal government and the states in managing the nation’s water resources. As water resources are subjected to growing demands caused by burgeoning populations and conservation needs, the intergovernmental cooperation manifested in the Black Canyon agreement becomes more important than ever.

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